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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

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IN RE GRAND JURY SUBPOENA

—o—

CECIL COE and PETER POE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether a court order, compelling the subject of a grand jury investigation to sign a statement authorizing the disclosure of his foreign bank records, violates the subject's Fifth Amendment privilege against self-incrimination.

2. Whether a judicial ruling, barring the introduction of a compelled authorization document as an admission in possible future criminal proceedings, constitutes a grant of "constructive use immunity" forbidden under this Court's decision in *United States v. Doe*, 465 U.S. 605 (1984).

3. Whether a court order, compelling an individual to sign a document containing statements he does not believe to be true, denies due process of law.

PARTIES TO THE PROCEEDINGS

CECIL COE and PETER POE are not Petitioners' true names. The use of pseudonyms is necessitated by the fact that the proceedings below in both the district court and the Court of Appeal were conducted under seal (and remain sealed at this time) to protect Petitioners' identities and the integrity of the grand jury proceedings. There are no parties other than those listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners CECIL COE and PETER POE pray that a writ of certiorari be issued to review the judgment entered in this matter by the United States Court of Appeals for the Second Circuit.

—o—

OPINION BELOW

The opinion of the Court of Appeals is awaiting publication, and is reprinted in the Appendix. (App. 1a.)[1]

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

The First Amendment provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

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[1]The sealing orders in the courts below prevent inclusion of several orders and documents which would normally appear in the Appendix. Specifically, the Court of Appeals' Judgment, the Court of Appeals' order granting Petitioners a stay, and the District Court's Orders of Contempt remain under seal and are not included in the Appendix. Petitioners will seek leave of the Court to file these documents under seal.

STATEMENT OF THE CASE

CECIL COE and PETER POE are targets of a federal grand jury investigation involving a military contractor located in the Southern District of New York. On May 28 and 29, 1987, the grand jury issued subpoenas *duces tecum*, requiring Petitioners to execute "Consent Directives"—documents authorizing disclosure of the records of any foreign banks or financial institutions at which Petitioners have or have ever had accounts.[2] Petitioners promptly moved to quash the subpoenas contending that (1) the directives were statements which could potentially be used against Petitioners in violation of their Fifth Amendment privilege against self-incrimination; and (2) because the subpoenas would force Petitioners to sign documents which falsely asserted their "consent," enforcement would violate due process of law.[3]

On June 15, 1987, the district court conducted a hearing on the motions to quash. The court modified the consent directives in certain respects, renaming them simply "Directives" and deleting the word "consent" from portions of the documents. However, the court left intact the central provision that the directives are "intended to apply to any and all bank confidentiality laws of any state or nation, and *shall be construed as consent with respect*

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[2]The full text of the directive served on Petitioner COE is appended to the district court's order of contempt, which will be filed with this Court under seal. (Except for the name of the subject, the directive served on Petitioner POE is identical).

[3]Petitioners proceeded below on additional grounds, including objections to the breadth of the directives and claims of illegal surveillance. We do not urge those claims in the instant Petition.

thereto. . . ." (App. 31a, emphasis added.) Rejecting Petitioners' assertion of their privilege against self-incrimination, the district court concluded:

> I do not find in the subpoena an element of testimonial compulsion. I shall require, as did the court in *United States v. Davis* [767 F.2d 1025 (2d Cir. 1985)], that the government will not use the compelled consent as an admission with respect to any accounts, with respect to control over any accounts or for any other purpose.

(6/15/87 TR 45.)[4] The district court then denied the motions to quash the subpoenas, as modified.

A week later, the foreman of the grand jury ordered Petitioners to sign the directives; they refused, and the district court immediately commenced proceedings *in re* contempt. At that hearing, Petitioners again argued, *inter alia*, that the incrimination and due process clauses of the Fifth Amendment precluded the Government from forcing them to sign the statements. At the conclusion of the hearing, the district court held Petitioners in civil contempt and ordered them confined pursuant to 28 U.S.C. § 1826. (App. 4a; 29a-30a.) The court temporarily stayed its order of confinement to permit Petitioners to seek and obtain a stay pending appeal from the Second Circuit. (App. 5a.)

Following an expedited hearing of Petitioners' appeals, the Second Circuit affirmed the holdings of contempt. (App. 15a.) The Court of Appeals' opinion focused primarily on whether signing the directives would

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[4]The citation refers to page 45 of the transcript of the June 15, 1987 hearing in the district court.

"constitute testimonial self-incrimination." (App. 8a.)[5] The Second Circuit relied almost entirely on the analysis set forth by the Eleventh Circuit in *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984).[6] That analysis is premised on the proposition that there is no essential difference between forcing a witness to produce records, and compelling a witness to sign a document which authorizes and directs a third party to produce those same records. (App. 10a.) Reasoning that no potentially incriminatory statements were made in the text of the directive, the *Ghidoni* analysis concludes that such directives are " 'devoid of any testimonial aspects.' " (*Ibid.*, quoting *United States v. Ghidoni, supra*, 732 F.2d at 818.) Thus, according to *Ghidoni*, the compelled signing of the directives is an act without testimonial implications; hence the Fifth Amendment privilege does not apply.

The Second Circuit recognized that the *Ghidoni* analysis has been rejected by the First Circuit, which found that such directives are in fact testimonial and potentially inculpatory. (App. 11a, discussing *In re Grand Jury Proceedings (Renauro)*, 814 F.2d 791 (1st Cir. 1987)). The Second Circuit found "some merit in the First Circuit's approach" (App. 12a), but nevertheless concluded that it was "constrained here to apply our precedent . . . and follow the analysis set forth in *Ghidoni*." (*Ibid.*) Thus,

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[5]The Court of Appeals noted that "[t]he compulsion element is clearly present here." (App. 7a.)

[6]The opinion includes an extensive discussion of the decisions in *United States v. Davis, supra*, 767 F.2d 1025, and *In re N.D.N.Y. Grand Jury Subpoena (Alexander)*, 811 F.2d 114 (2d Cir. 1987). Both of these cases rely, in turn on *Ghidoni*.

the Second Circuit panel embraced the Eleventh Circuit's position that the directives constituted statements that were neither testimonial nor potentially incriminatory within the context of the Fifth Amendment privilege.

The Court of Appeals then addressed the propriety of the district court's order prospectively excluding the directives from evidence in future prosecutions against Petitioners. The Second Circuit noted that this Court has forbidden the practice of *de facto* use immunity, but determined that use immunity was not at issue because the directives contained no incriminating testimonial assertions. (App. 13a.) Instead, the Court of Appeal concluded, the district court had simply entered an evidentiary ruling "relating to materiality, relevance, prejudice, etc." (App. 14a), and had barred the admission of the directives because they "lack any probative testimonial value." (*Ibid.*)

Finally, the Court of Appeals rejected Petitioners' due process claim. Petitioners had argued that the district court cannot permit its process to be enlisted in furtherance of a fraud—i.e., the assertion of "consent" which had in fact been coerced. Noting that the directives state that they were signed pursuant to court order, the Second Circuit held that this disclaimer was sufficient to satisfy its own precedent on that issue. (App. 14a-15a.)

Circuit Judge Jon O. Newman filed a separate opinion, concurring in the panel's opinion but nevertheless expressing reservations about the analysis traced by his colleagues. Judge Newman observed that *Ghidoni* and its progeny assertedly derive from this Court's decisions in *Fisher v. United States*, 425 U.S. 391 (1976) and *United States v. Doe*, 465 U.S. 605 (1984). In those cases, however,

> the Supreme Court did not purport to announce a universal test for determining the scope of the privilege. It simply acknowledged that the privilege applies to *acts* that imply assertions of fact. It did not have occasion to consider the test for determining when the privilege applies to oral or written *communications*. . . . What the Supreme Court has not yet decided is the issue posed by a "consent" directive: Does the privilege apply to every written or oral statement, the content of which might tend to incriminate?

(App. 21a (original emphasis)). Although he agreed the panel was bound by Second Circuit precedent, Judge Newman suggested that "[w]ere the matter open in this Circuit, I would deem the issue to be extremely close." (App. 20a.) Similarly, Judge Newman allowed that, but for earlier Second Circuit cases, he "would have thought that our supervisory power should be exercised to make clear that the 'consent' is being signed, not merely pursuant to court order but also under protest." (App. 26a.)

After filing its opinion, the Second Circuit granted Petitioners' request to stay the issuance of the mandate through September 30, 1987, "to permit the filing of a Petition for a Writ of Certiorari. . . ."

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REASONS FOR GRANTING THE PETITION

The Fifth Amendment prohibits the government from compelling an accused to make a statement if its contents are potentially incriminatory. This fundamental principle arises from the literal text of the Amendment, from the essential values upon which the Amendment was founded,

and from the settled precedent of this Court. The district court's order requiring Petitioners to sign the directives in the instant case contravenes this principle; and by affirming that order, the Second Circuit has placed itself in direct conflict with the Court of Appeals for the First Circuit. Certiorari should issue to re-affirm the primacy of the privilege and to resolve the conflict among the Circuits.

In addition, the Second Circuit affirmed the district court's order that the directives would be inadmissible against Petitioners in subsequent proceedings; that order was a transparent grant of "constructive use immunity" and thus in conflict with this Court's decision in *United States v. Doe, supra,* 465 U.S. 605. Finally, the decision below commands Petitioners to adopt a statement which they find objectionable and know to be false. Although the issue has never been posed to this Court, we submit that such coerced dishonesty in the context of a judicial proceeding is fundamentally offensive to free speech and due process of law.

For these reasons, explained more fully below, Petitioners respectfully pray the Court to grant their Petition.

1. The Decision Below Is Squarely In Conflict With A Decision Of Another Circuit On The Same Issue Of Law

A debate is emerging in the federal courts whether grand jury targets may be compelled to execute authorizations for the release of foreign bank records. The decision below is the most recent expression of that conflict; in ruling that the privilege against self-incrimination does not protect Petitioners in this case, the Second Circuit re-

luctantly rejected the holding of the First Circuit on precisely the same legal issue. See *In re Grand Jury Proceedings (Renauro), supra,* 814 F.2d 791. In *Renauro,* the First Circuit in turn expressly acknowledged the conflict between its holding and the conclusions reached by the Eleventh and Fifth Circuits. *Id.* at 795, citing *United States v. Ghidoni, supra,* 732 F.2d 814, and *In re United States Grand Jury (Cid),* 767 F.2d 1131 (5th Cir. 1985). Finally, the Eleventh Circuit's *Ghidoni* analysis, which forms the basis for the holding in the instant case, has been rejected by district courts in the District of Columbia and Sixth Circuits. *Senate Select Committee On Secret Military Assistance To Iran And The Nicaraguan Opposition v. Secord,* 664 F.Supp. 562 (D.D.C. 1987); *United States v. Pedro,* 662 F.Supp. 47 (W.D.Ky. 1987)[7]

The Solicitor General, addressing the identical legal issue in a case originating in the Fifth Circuit, has advised this Court that "[t]his conflict in the circuits is of considerable importance to the administration of criminal justice." Memorandum for the United States at 4, *John Doe v. United States, on petition for cert.,* petition filed, 55 U.S.L.W. 3760 (U.S. May 1, 1987) (No. 86-1753). Thus, the Solicitor General has already requested that certiorari be granted to resolve one of the questions posed by the instant petition: Whether the Fifth Amendment is implicated by a court order compelling consent to the disclosure of foreign bank records. *Ibid.* We submit that

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[7]The vitality of the debate is underscored by the fact that the leading opinions on both sides of the issue were decided over vigorous dissents. *In re Grand Jury Proceedings (Renauro), supra,* 814 F.2d at 797 (Breyer, J., dissenting); *United States v. Ghidoni, supra,* 732 F.2d at 819 (Clark, J., dissenting).

the other important issues raised by this Petition merit the granting of certiorari in this particular case.

2. Judgment Below Coerces The Petitioners To Make Statements That Could Inculpate Them And Thus Violates Their Fifth Amendment Privilege Against Self-Incrimination.

"The Fifth Amendment . . . commands that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' " *Estelle v. Smith,* 451 U.S. 454, 462 (1981). This constitutional privilege "is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' " *Id.,* at 468, *quoting Malloy v. Hogan,* 378 U.S. 1, 8 (1964). In delineating the outer edges of the privilege, this Court has frequently referred to its irreducible core, as defined by Justice Holmes:

> [T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him . . . .

Holt v. United States, 218 U.S. 245, 252-53 (1910), *quoted in, United States v. Wade,* 388 U.S. 218, 222 (1967); *see also Schmerber v. California,* 384 U.S. 757, 763 (1966); *McCormick On Evidence* § 124, at 302 (E. Cleary, 3d ed. 1984).

Applying these precepts, this Court has consistently ruled that the government may not legally compel anyone to make or adopt a statement if the contents of the statement could jeopardize the speaker's penal interests. *Murphy v. Waterfront Commission,* 378 U.S. 52, 57 and n.6

(1964); *see also Estelle v. Smith, supra,* 451 U.S. at 463-65; *United States v. Mara,* 410 U.S. 19, 22 (1973). Moreover, the Court has held that the incriminatory aspects of the communication need not be affirmatively proven before a witness may rely on the privilege to remain silent. *Hoffman v. United States,* 341 U.S. 479, 486 (1950). Instead, this Court has required only that the witness' apprehensions be reasonable and not clearly mistaken. *Id.* See also *Mason v. United States,* 244 U.S. 326, 365 (1917). Thus, where the government seeks to compel a statement from the suspect in a criminal investigation, the privilege must be sustained if the witness demonstrates that the communication "*might* be dangerous because injurious disclosure *could* result." *Hoffman v. United States, supra,* 341 U.S. at 487 (emphasis added).

In the present case, the investigative authorities seek to accomplish exactly that which the Fifth Amendment privilege forbids. There is no dispute that Petitioners' signature on the directives would be coerced. It is equally apparent that the coercion is being employed to force Petitioners to make a communicative statement—specifically, to communicate to third persons their purported desire and authorization for disclosure of their financial records.[8] Thus, the directives necessarily assert the fact of Petitioners' authorization.

Finally, it is clear that the directives which they have been ordered to sign could potentially inculpate Petitioners. As the First Circuit explained in *Renauro*:

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[8]Obviously, there is no constitutional distinction to be drawn here between oral and written statements. See e.g., *Marchetti v. United States,* 390 U.S. 39 (1968).

> The fact of [the target's] consent is potentially incriminating, for it could be used, before the grand jury or at trial, to prove the ultimate facts that accounts in [the target's] name existed or that [the target] controlled those accounts. We explain with the following scenario: Suppose that at trial the government were to introduce bank records produced in response to a subpoena that had been accompanied by the consent form and that it was not apparent from the face of the records or otherwise how [the target] was linked to them. Suppose also that the government then introduced the subpoena and consent form, and a government witness testified that the bank records were received in response to the subpoena and consent form. Would not the evidence linking [the target] to the records be his own testimonial admission of consent? We believe it would. In other words, the testimonial admission (in substance, "I consent to the release of records relating to accounts, if any, which you, bank, believe are mine") would have been used as some evidence of [the target's] control of the accounts. For this reason, we conclude that the Fifth Amendment prohibits the government from using [the target's] compelled admission of consent as evidence against him.

In re Grand Jury Proceedings (Renauro), supra, 814 F.2d at 793.

The Second Circuit's decision in this case did not directly take issue with the analysis traced by the First Circuit in *Renauro;* rather, on the basis of earlier Second Circuit cases, the Court of Appeals felt obligated to employ the analysis in *United States v. Ghidoni, supra,* 732 F.2d 814. As previously noted, the linchpin of the *Ghidoni* analysis is the notion that the disputed directives are not subject to the protection of the incrimination clause because they are not "testimonial." *Id.* at 817, *quoting*

Fisher v. United States, supra, 425 U.S. at 411. Thus, *Ghidoni* stands for the anomalous proposition that it is possible for the contents of a written statement not to be "testimonial" as that term is used in Fifth Amendment jurisprudence.

Neither *Ghidoni* nor the Second Circuit's opinion in the present case addressed why the words "communication" and "testimonial" should possess meanings in the context of the Fifth Amendment privilege which differ from their common and ordinary usage. By contrast, in discussing the Fifth Amendment privilege, Dean Wigmore specifically defines "testimonial" as "communicative or assertive." 8 Wigmore, *Evidence* § 2263 (McNaughton rev. 1961); see also *McCormick On Evidence, supra,* § 124 (treating the words "testimonial" and "communicative" as synonyms in the context of the incrimination clause). Similarly, this Court's opinions have consistently used the words "communications" and "testimony" interchangeably when discussing statements that assertedly fall within the purview of the privilege. E.g., *South Dakota v. Neville,* 459 U.S. 553, 559-61 (1983); *United States v. Wade, supra,* 388 U.S. 218, 223; *Schmerber v. California, supra,* 384 U.S. 757, 760-65.

Ignoring these basic definitional points, *Ghidoni* and its progeny have trenched upon the clearest and brightest line in Fifth Amendment jurisprudence: The absolute protection provided to those who refuse to speak lest the contents of their speech be used against them. The breach is manifest in *Ghidoni's* assumption that speech compelled for its content is not by definition "testimonial." This assumption results from the inappropriate application, to

speech, of an analysis which this Court developed for non-verbal acts (which may or may not have communicative implications).[9]

By abandoning the clear distinction between verbal communication and non-verbal acts, these courts have embraced a thoroughly impractical standard for determining when speech is in fact "testimonial" under the Fifth Amendment. Thus, according to *Ghidoni*, the directives are not "testimonial" because they do not constitute an "explicit statement" regarding the ultimate facts (i.e., the existence of accounts and the subjects' control over them), and because the text of the directives do not implicate the "truth-telling" of the declarant. (App. 10a; *United States v. Ghidoni, supra,* 732 F.2d at 818.)

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[9]Given the literal text of the Fifth Amendment, there is a fundamental distinction between compelling oral or written statements and the coercion of non-verbal acts. Behavior in the latter category generally falls outside the privilege even if coerced, and despite the fact that it may lead to the production of "physical or real evidence." *South Dakota v. Neville, supra,* 459 U.S. at 559-61. Indeed, this Court has differentiated between "testimonial" and "non-testimonial" communications only when analyzing the Fifth Amendment significance of compelled non-verbal acts, which arguably possess an incidental communicative aspect. *United States v. Doe, supra,* 465 U.S. at 612; *Fisher v. United States, supra,* 425 U.S. at 410-13. In such cases, the underlying question is whether the unsought and unintended "communication" inherent in the compelled act is sufficiently significant to the legal inquiry to be "testimonial." *Id.; United States v. Doe, supra,* 465 U.S. 613-14 and n.12. Thus, the issue in *Doe* and *Fisher* was whether the communicative aspects of the coerced acts were substantial enough to mandate their protection under the privilege despite the fact that the subject of the coercion was not a "witness" as required by the literal text of the Fifth Amendment. By contrast, this Court has never suggested that the content of a written or oral statement might not be "testimonial" in the context of an assertion of the privilege.

This approach is insupportable. First, the predicate is simply incorrect, for the directives do assert a fact: The fact that the declarant "directs and authorizes" disclosure of the records of any foreign accounts he may have. If they sign the directives, Petitioners will necessarily communicate that *fact* to whomever the documents are given. *In Re Grand Jury Proceedings (Renauro), supra,* 814 F.2d at 793-94.[10]

Second, the *Ghidoni* approach confuses the determination of whether a particular expression is "testimonial" with the unrelated inquiry whether that expression is "incriminatory." As a matter of logic, identifying the ultimate fact is relevant only to the latter issue. Moreover, the *Ghidoni* formulation ignores the well-established tenet that privileged speech need not address an "ultimate fact" but need only "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States, supra,* 341 U.S. at 486. See also, *In re Grand Jury Proceedings (Renauro), supra,* 814 F.2d at 796.[11] Consequently, the absence of an

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[10]Judge Breyer, dissenting in *Renauro,* argued that the statements made in a "consent" directive are "verbal acts" rather than "assertions". *Renauro, supra,* 814 F.2d at 798 (Breyer, J., dissenting). Upon consideration, however, it seems clear that the two concepts are not mutually exclusive—i.e., that assertions may also be verbal acts without ceasing to be assertions. Indeed, the statement "I authorize the release of any records I may have" is both an assertion of fact and an instrumental message, which the government wishes to "communicate" to foreign banks.

[11]In his concurring opinion below, Judge Newman concedes that "if the connection of the records to the witness were disputed, the 'consent' document would have some ma-

(Continued on following page)

explicit statement concerning an ultimate fact cannot alter the testimonial (and privileged) nature of the directives' contents.[12]

Third, by focusing exclusively on the "truth-telling" policy underlying the privilege, the *Ghidoni* analysis betrays an impermissibly constricted view of the Fifth Amendment. This Court has expressly rejected the contention that the scope of the privilege can be defined by reference to a single underlying policy. It is true that the privilege accords protection against "the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Commission, supra,* 378 U.S. at 55, 56, n.5. However, this is but one of the important policies upon which the privilege was founded:

(Continued from previous page)

teriality to the issue. . ." but suggests that the evidence which would be obtained from the bank to authenticate the records would probably furnish better proof of the connection, thus relieving the witness of " 'any realistic threat of incrimination.' " (App. 26a, *quoting Fisher v. United States, supra,* 425 U.S. at 412.) But it is well established that the incriminatory element of the privilege is satisfied if the coerced communication could conceivably be used against the witness. *Hoffman v. United States, supra,* 341 U.S. at 486-87. The witness is not required to rely on a judge's speculation that the communication is not incriminating because "better" evidence might be forthcoming.

[12]It is important to note that the Second Circuit did not reject the *Renauro* analysis as a description of *fact.* Rather, the Second Circuit held the directives to be devoid of testmonial aspects entirely on the basis that it was bound by its own precedent to do so. In other words, the court resolved the essential inquiry by rendering a legal decision instead of making the required factual determination. *See, United States v. Doe, supra,* 465 U.S. 613-14. Consequently, this case does not come to this Court in the same posture as *United States v. Doe,* where both the Court of Appeals and the district court had made factual determinations regarding the testimonial and incriminating aspects of the communicative event in dispute. *Id.*

> The privilege against self-incrimination represents many fundamental values and aspirations. It is "an expression of the moral striving of the community . . . a reflection of our common conscience. . . ." That is why it is regarded as so fundamental a part of our constitutional fabric, despite the fact that "the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect." *It will not do, therefore, to assign one isolated policy to the privilege, and then to argue that since "the" policy may not be furthered measurably by applying the privilege [in a given context], it follows that the privilege should not be so applied.*

Murphy v. Waterfront Commission, supra, 378 U.S. at 56-57, n.5 (citations omitted) (emphasis added); *see also South Dakota v. Neville, supra,* 459 U.S. at 560-62. As this Court has repeatedly remarked, "[t]he Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard. . . . '" *Estelle v. Smith, supra,* 451 U.S. at 467-68, *quoting, Counselman v. Hitchcock,* 142 U.S. 547, 562 (1892). That "mischief" includes, first and foremost, forcing a person to make potentially incriminating statements. E.g., *Estelle v. Smith, supra,* 451 U.S. 454; *Malloy v. Hogan, supra,* 378 U.S. at 8.

Finally, this Court has previously eschewed the very propositions embraced in *Ghidoni*—i.e., that the privilege can be delimited by reference to a "truth-telling" standard and that the privilege only applies to explicit statements of ultimate facts. In *Estelle v. Smith, supra,* 451 U.S. 454, the Court held that the Fifth Amendment privilege was violated when the government's psychiatrist was permitted to testify regarding conclusions he had drawn from an unwarned interview with the defendant. The State argued that the privilege did not apply because the state-

ments made by the defendant to the psychiatrist were "nontestimonial in nature." *Id.* at 463. The Court rejected that argument, holding that the privilege against self-incrimination was "directly involved here because the State used as evidence against [the defendant] the substance of his disclosures during the pretrial psychiatric examination." *Id.* at 464-65.

Clearly, in *Estelle,* the prosecution did not rely on the defendant's "truth-telling" to make its point when it tendered the psychiatrist's testimony. Nor had the defendant's statements concerned ultimate facts in the criminal proceedings. Nevertheless, this Court ruled that the privilege had been violated because the content of the defendant's statements had been used to help provide the evidentiary basis for the State's legal claim. Thus, the analysis adopted by the Second Circuit is thoroughly irreconcilible with the holding in *Estelle,* for it permits the government to coerce statements, the contents of which could be useful to the government in future criminal proceedings.

In short, the decision below offends the incrimination clause of the Fifth Amendment by permitting the government to coerce statements, not for their look or sound but for their contents. In his concurring opinion below, Judge Newman suggests that this "Court has not yet decided . . . the issue posed by a consent directive: Does the privilege apply to every written or oral statement, the content of which might tend to incriminate?" (App. 22a). Petitioners submit that the question has in fact been addressed by this Court, and answered in the affirmative. Nevertheless, the lower courts' confusion on this question demonstrates that this Court must again define the clear

boundaries of the Fifth Amendment's protection against self-incrimination.

3. The Prospective Exclusion Of Compelled Statements Is In Reality A Grant Of Constructive Use Immunity And Thus Is Contrary To A Decision Of This Court

If the Government wishes to obtain a statement authorizing the disclosure of records without violating the signator's privilege against self-incrimination, it need merely request and obtain "use immunity" for the signator pursuant to 18 U.S.C. §§ 6002-03. *See In Re Grand Jury Proceedings (Renauro), supra,* 814 F.2d at 796. Under such a grant of immunity, the Government would of course be precluded from introducing the statement as evidence against the signator in future criminal proceedings. *Id.* However, the Government has not made any statutory request for use immunity in this case. Instead, the district court without the benefit of statutory authority, ordered the Government not to use the "compelled consent[s]" as evidence for any purpose. The Second Circuit affirmed that order in its decision. (App. 14a.)

The district court's prospective exclusion of evidence in this case was a thinly veiled attempt to grant *de facto* or "constructive" use immunity. This Court has considered the propriety of such orders, and has explicitly held them to be beyond the jurisdiction of the lower courts:

> We are urged to adopt a doctrine of constructive use immunity. Under this doctrine, the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production against the person claiming the privilege even though the statutory procedures have not been followed.

> We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires.

United States v. Doe, supra, 465 U.S. at 616 (footnote omitted).

Recognizing that a non-statutory grant of use immunity would be unlawful, the Second Circuit asserted that the district court had done no such thing. Rather—according to the Court of Appeals—the district court was "merely ruling on evidentiary questions relating to materiality, relevance, prejudice, etc., all of which could be and were resolved in the sound discretion of the district court." (App. 14a.) Thus the district court purportedly ordered the prospective exclusion of the directives "because they lack any probative value." (App. 13a.)

The Second Circuit's rationalization is unconvincing. The Court of Appeals ignored the fact that no criminal charges had yet been filed against Petitioners. Nor was there any reason to conclude that, if charges were eventually filed, the same district judge would preside over the case. It is elementary that a judge does not have jurisdiction over all potential cases in his or her district, and in fact has no authority to make orders in a case that is not pending before him or her. See, *Gardiner v. A.H. Robbins Co.*, 747 F.2d 1180, 1188 (8th Cir. 1984).

More fundamentally, federal courts are prohibited from issuing rulings in a case that does not yet exist: "The case or controversy requirement of Article III is fundamental, and dictates that legal issues be presented in the context of actual cases and not in the abstract." *National Treasury Employees Union v. Kurtz,* 600 F.2d 984, 987-88

(D.C. Cir. 1979), *citing United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). Because there was no case pending in which any party had sought or would seek to introduce the directives into evidence, determinations of relevancy and probity were premature and necessarily lacked any legal basis.[13]

These principles of federal jurisprudence are so fundamental and well-established that it strains credulity to suggest that the district court would ignore them. Instead, the district court erred in relying on a prior decision of the Second Circuit in which the trial court's granting of *de facto* immunity was upheld. See, *United States v. Davis*, *supra*, 767 F.2d at 1040. This approach must not be permitted to gain currency among the lower courts, for it would undermine the principle that the judiciary lacks authority to bestow immunity absent a formal statutory request from the Attorney General. *United States v. Doe*, *supra*, 465 U.S. at 616. Accordingly, the Court's guidance is needed to ensure the integrity of its decision precluding the use of constructive immunity.

4. By Coercing Petitioners To Make False And Misleading Statements, The Judgment Below Invokes The Courts' Processes For An Improper Purpose, And Offends Due Process.

In various contexts, this Court has repeatedly held that the Government may not compel an individual to pro-

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[13]In addition, prospective rulings are particularly inappropriate when the issue is the relevancy of a given piece of evidence, for relevance is by its nature a determination that must be made in the immediate context in which the evidence is proffered. See 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶¶ 401[01], 401[08] (1986).

mote an idea or to utter words which the individual conscientiously believes to be false or objectionable. E.g. *Wooley v. Maynard,* 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Board of Education v. Barnette,* 319 U.S. 624 (1943). This case presents the issue in a novel situation: May the processes of the federal courts be invoked to force an individual to make a statement which is patently false and demonstrably misleading? Petitioners submit that such a practice would compromise the integrity of the federal courts, undermine Petitioners' right to free speech, and gravely offend due process.

From the inception of these proceedings, Petitioners have objected that the directives falsely set forth Petitioners' consent, and that the directives are misleading because they do not indicate that they are the product of coercion. The district court responded by making several cosmetic modifications—dropping the word "consent" from some, but not all, portions of the documents, and adding that the documents were being signed in compliance with a court order.[14] Nonetheless, the documents still betray their only

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[14]The bland language inserted by the district court—that the declarant is signing to comply with a court order—is obviously not a clear statement of duress. As Judge Newman observed in his concurring opinion below: "There are some documents a person would cheerfully sign pursuant to a court order. These witnesses ought to be able to make clear that a court has ordered them to sign a document they would otherwise have refused to sign." (App. 26a.) That sort of honest statement would, of course, vitiate the utility of the document—as the Government candidly admitted in an earlier "consent directive" case. *In re N.D.N.Y. Grand Jury Subpoena (Alexander), supra,* 811 F.2d at 116. The Government's refusal to include in the document a straightforward description of how it was obtained underscores the dishonest and misleading nature of the directive.

real purpose: To provide proof to foreign governments and financial institutions that Petitioners have "consented" to the release of any and all records that may pertain to them.[15]

In fact, Petitioners have not given any such consent, and it would be dishonest for them to state otherwise. Consent is by definition an agreement given *without* coercion:

> [v]oluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. . . . It means voluntary agreement by a person . . . to do something proposed by another. . . . Willingness in fact that an act or an invasion of an interest shall take place.

Black's Law Dictionary, 276 (rev. 5th ed. 1976). See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); P. Bschoor & M. Mullin, *Court-ordered Waivers of Foreign Banking Secrecy Rights: An Evaluation of the American Position*, in *Beitrage zum Schweizerischen Bankenrecht*, 181, 183-88 (R.v. Graffenreid, ed. 1987) (footnotes omitted) [hereinafter cited as *Court-ordered Waivers*].[16]

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[15]The fact that the directive remains essentially a statement of *consent*, despite the district court's modifications, is underlined by Judge Newman's continued reference to it as such in his opinion below. (See, App. 20, 25 and 26.)

[16]Discussing *United States v. Ghidoni, supra*, 732 F.2d at 818 and n.7, the commentators note that:

> The court in *Ghidoni* assumed, without any citation of authority or consideration of the meaning of the word "consent," that the court-ordered consent would relieve the bank of its secrecy obligations; indeed, the court dismissed as "border[ing] on frivolous" Ghidoni's contention that he was being forced to sign a false communication which stated

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Because there would be nothing voluntary or uncoerced about their authorizations, Petitioners could not in good conscience state that those documents should be "construed as consent." The deception inherent in the directives is, if anything, compounded by the reference to the bank confidentiality laws of foreign states. The government has submitted no authority for the proposition that courts of other nations would accept a coerced signature on a document as "consent," and Petitioners have no reason to believe that they would. What that language does establish, however, is that the directives are specifically designed to convey to judges and officials elsewhere something which is simply not true.[17]

Thus, the contempt orders coerce Petitioners to make a statement that they know is not true and which is designed to mislead third parties. Yet this Court has long recognized the right of individuals to resist Government coercion and to remain silent rather than utter that which they do not believe. See, e.g., *Wooley v. Maynard, supra,*

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that he consented when he did not. The court stated: "The consent directive is perfectly clear in stating that Ghidoni is signing under the compulsion of the court order." The concept of "forced consent" thereby joined those other distinctly English language idioms known as oxymorons, such as "cruel kindness," "deafening silence," and maybe even "jumbo shrimp."

[17]Indeed, the Grand Court of the Cayman Islands (a nation with particularly strict bank secrecy laws) has observed that "consent given under compulsion is merely submission to force." *In the Matter of the Confidential Relationships (Preservation) Law 17 of 1976,* Judgment of the Grand Court of the Cayman Islands, Cause No. 269 of 1984 (July 24, 1984), quoted in *Court-ordered Waivers, supra,* at 188.

430 U.S. at 714-15; *Board of Education v. Barnette, supra,* 319 U.S. at 633-34. Although that right derives initially from the First Amendment, the Court has recognized that the right of free speech (and thus the attendant right not to speak) are among the myriad cross beams in the structure of Due Process, upon which our legal system is founded.[18] See, e.g., *Stromberg v. California,* 283 U.S. 359, 368 (1930).

Petitioners submit that the Due Process Clause contains an analogous protection against the use of judicial power to coerce an individual to utter demonstrably misleading statements in the course of legal proceedings. A contrary result would give constitutional sanction to practices that could corrupt the integrity of the federal judicial system,[19] while denying the Due Process Clause "its his-

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[18]Although the cited cases are based on the Due Process Clause of the Fourteenth Amendment, "[i]t cannot be doubted that the Due Process Clause of the Fifth Amendment safeguards against all that its counterpart in the Fourteenth Amendment bans." *United States v. Bernett,* 495 F.2d 943, 951 n. 37 (D.C. Cir. 1974) (Spottswood Robinson, J., concurring and dissenting), *citing Bolling v. Sharpe,* 347 U.S. 497, 500 (1954); *Bowles v. Willingham,* 321 U.S. 503, 518 (1941); *Agnello v. United States,* 269 U.S. 20, 33-34 (1925).

[19]In an earlier case, the Second Circuit was sufficiently troubled by the misleading nature of a consent directive to refuse to order it signed. *In re N.D.N.Y. Grand Jury Subpoena (Alexander), supra,* 811 F.2d at 117-18. In that case, the Court of Appeals based its ruling on the inherent "supervisory power" of the federal appellate courts. *Id.* at 118, *citing Cupp v. Naughten,* 414 U.S. 141, 146 (1973). The court concluded, however, that the defect in the document could be cured by a statement that "it was being executed pursuant to court order or . . . 'under protest.' " *In re N.D.N.Y. Grand Jury Subpoena (Alexander), supra,* 811 F.2d at 118. It was that conclusion which the Second Circuit felt obliged to follow in its decision below. (See App 14a-15a.)

toric function of assuring appropriate procedure before liberty is curtailed or life is taken." *Watts v. Indiana,* 338 U.S. 49, 55 (1948).

It remains for this Court to delineate the protections provided by the Due Process Clause to individuals who are compelled by judicial process to make statements that they cannot in good conscience affirm.

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CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1575 August Term, 1986

(Argued: July 14, 1987 Decided: August 14, 1987)

Docket No. 87-6165

In Re: GRAND JURY SUBPOENA
TWO GRAND JURY CONTEMNORS,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BEFORE:

NEWMAN, MINER and ALTIMARI,
Circuit Judges.

(Filed Aug. 14, 1987)

Expedited appeal from orders of the United States District Court for the Southern District of New York (Vincent L. Broderick, *Judge*) holding appellants in civil contempt for refusing to sign directives authorizing foreign financial institutions to disclose information and deliver documents to the Government, and ordering them confined. Affirmed. Judge Newman concurs in a separate opinion.

CRISTINA C. ARGUEDAS, Berkeley, CA (Penelope M. Cooper, Cooper & Arguedas, Berkeley, CA, of counsel), *for Appellant.*

PETER E. FLEMING, New York, NY (William L. Osterhoudt, San Francisco, CA, and Curtis, Mallet-Prevost, Colt & Mosle, New York, NY, of counsel), *for Appellant.*

BARUCH WEISS, Assistant United States Attorney, New York, N.Y. (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Bruce A. Green, Assistant United States Attorney, of counsel), *for Appellee.*

ALTIMARI, *Circuit Judge:*

Appellants, two witnesses before the grand jury, appeal from orders of the United States District Court for the Southern District of New York (Vincent L. Broderick, *Judge*), which held them in civil contempt for refusing to sign directives authorizing foreign financial institutions to release documents and information to the government, and ordered them confined until they signed the directives. 28 U.S.C. § 1826(a). Appellants contend *inter alia* that compelled execution of the directives, as written, would violate their fifth amendment privilege against self-incrimination and right to due process of law. Because we find no fifth amendment violation here, we affirm.

FACTS and BACKGROUND

On May 28 and 29, 1987, the grand jury issued subpoenas duces tecum to appellants which required them to sign "consent directives" which were attached to the subpoenas. The directives provided that the signator, i.e.,

both appellants, authorized foreign financial institutions to disclose to the government information and documents relating to accounts maintained by appellants, or their corporations, at the foreign financial institutions. The directives did not acknowledge that accounts in foreign financial institutions were in existence or that they were controlled by appellants. Nor did the directives indicate whether documents or any other information relating to appellants were present at foreign financial institutions, assuming that such accounts did exist.

The directives provided that they should be "construed as consent" with respect "to any and all bank confidentiality laws of any state or nation." In addition, and apparently to make it clear that, although the directives were to be construed as consent, they nevertheless were being compelled by the grand jury, the directives provided that they were executed "in compliance with the direction of a Grand Jury Subpoena Duces Tecum."

On June 8, 1987, appellants filed motions to quash the subpoenas, arguing *inter alia* that compelled execution of the directives would violate their fifth amendment rights. After a hearing on June 15, 1987, the district court denied their motions to quash after it found that execution of the directives by appellants would not involve testimonial communications, and thus created no basis for fifth amendment violations. The district court then ordered appellants to appear before the grand jury to sign the directives.

In light of appellants' objections to some of the language contained in the directives, however, the district court modified them by changing the title from "Consent Directive" to "Directive," and specifying that they were

being executed in compliance with a court order, rather than in compliance with the direction of a grand jury subpoena. The district court also provided that the directives could not be used as an admission against appellants in any subsequent trial, and it inserted a time limitation in the directives so that, as modified, they authorized disclosure of information and records dating back to 1980.

On June 22, 1987, appellants appeared before the grand jury and refused to sign the directives as modified by the district court, despite being ordered to do so by the grand jury foreman. On the same day, and after a hearing, the district court found appellants in civil contempt, and ordered them incarcerated until such time as they executed the modified directives. 28 U.S.C. § 1826(a). At the hearing, the district court again stated that it found no testimonial communications implicated by the execution of the directives, and noted that if appellants had executed the directives, the government would have been barred from using them as an admission in any subsequent trial. The district court stated that it did not feel its order excluding the admission of the directives into evidence was required by the fifth amendment, but was in response to Second Circuit precedent which provided for such exclusion.

The district court then denied appellants' motion for a stay or bail pending appeal of the contempt and confinement orders, but granted them a limited stay to apply to this court for a stay pending appeal. On June 25, 1987, we continued the stay of confinement until the matter could be heard on an expedited basis, and at oral argument on July 14, 1987, we continued the stay until disposition

of this appeal. For the reasons stated below, we affirm the district court orders holding appellants in contempt, and accordingly, lift the stay of execution of the confinement orders.

DISCUSSION

In this expedited appeal, appellants present several challenges to the district court orders requiring them to sign the directives at issue. Appellants assert, first, that the orders violated their fifth amendment privilege against compelled self-incrimination; and second, that absent language in the directives indicating that appellants signed them under protest and under threat of confinement, they were being compelled to sign false documents. Appellants also raised other challenges which we find are without merit, and thus we summarily reject them.

With respect to the self-incrimination claim, appellants recognize that precedent in this Circuit has approved of the compelled execution of directives in the face of fifth amendment challenges, *In Re N.D.N.Y. Grand Jury Subpoena,* 811 F.2d 114 (2d Cir. 1987), and *United States v. Davis,* 767 F.2d 1025 (2d Cir. 1985), but contend that those cases conflict with the Supreme Court's decision in *United States v. Doe,* 465 U.S. 605 (1984), to the extent that they purportedly relied on a de facto use immunity to obviate any fifth amendment problems. Appellants thus invite us to reverse our prior decisions in light of this conflict, and hold that compelled execution of the directives violates their fifth amendment privilege against self-incrimination. We decline appellants' invitation, and we write here to clarify the meaning of our prior decisions.

I. *Self-incrimination claim.*

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Despite this broad language, however, the fifth amendment does not proscribe the compelled production of every sort of incriminating evidence. *Fisher v. United States,* 425 U.S. 391, 408 (1976). Historically, the privilege has been interpreted to protect a witness from being compelled to make self-incriminating "communications, whatever form they might take[.]" *Schmerber v. California,* 384 U.S. 757, 763-764, 763 n.7 (1966) (refusing to adopt Wigmore's formulation of the privilege which covered only "testimonial disclosures"). The scope of the privilege, however, has since been limited, and it now "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher,* 425 U.S. at 408 (emphasis in original). In contrast, the privilege does not bar compelling an accused to provide, or making him the source of, real or physical evidence, *Schmerber,* 384 U.S. at 764-765, even though the accused may be compelled to speak, *United States v. Wade,* 388 U.S. 218, 222-223 (1967), or write, *Gilbert v. California,* 388 U.S. 263, 266-267 (1967), provided that his speech or writing exemplar is sought for identification purposes, and not to "disclose any knowledge he might have." *Wade,* 388 U.S. at 222.

To establish a fifth amendment violation, appellants must therefore demonstrate the existence of three elements: 1) compulsion, 2) a testimonial communication, and 3) the incriminating nature of that communication. *In Re N.D. N.Y. Grand Jury Subpoena,* 811 F.2d 114, 116 (2d Cir. 1987). The compulsion element is clearly present here.

See United States v. Browne, 624 F. Supp. 245, 248 (N.D. N.Y. 1985) (where the court orders an individual to sign a consent form after he refuses, the element of compulsion is met). More troublesome, though, is the question of whether ordering appellants to sign the directives—and thus requiring them to authorize disclosure of records and information if any exist—constitutes testimonial self-incrimination. We conclude, however, that it does not.

At the outset, we emphasize that appellants do not contend, nor could they argue, that their fifth amendment privilege extends to preclude the financial institutions from producing records or information regarding appellants' transactions. *United States v. Davis,* 767 F.2d 1025, 1039 (2d Cir. 1985). Thus, since the directives are the only communications which appellants were compelled to make, they are the only possible source of a fifth amendment violation. *Id.*

In this regard, we have twice approved of the compelled execution of a directive in the face of fifth amendment self-incrimination challenges. Thus, in *Davis,* while we observed that a directive, such as the one at issue, *may* have had aspects that were communicative in nature, 767 F.2d at 1040, we nevertheless rejected the appellant's fifth amendment challenge because we found that any potential fifth amendment problems were obviated by the fact that the district court precluded the government from using the directive as an admission at trial. *Id.* We did not, however, decide in *Davis* whether the communicative aspects of the directive were either testimonial or incriminating in nature.

Recently, however, we were called upon to address the precise questions which were left unresolved in *Davis*. Thus, in *In Re N.D.N.Y. Grand Jury Subpoena*, 811 F.2d 114 (2d Cir. 1987), we considered, in a factual context quite similar to the instant appeal, whether compelled execution of a directive—whose wording was nearly identical to the one at issue—constituted a *testimonial* communication that was incriminating. There, we observed that the directive at issue employed language "that require[d] disclosure [of bank records] only *if* the bank ha[d] such accounts." *Id.* at 117 (citations omitted) (emphasis in original). Relying on the Eleventh Circuit decision in *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984), we concluded that "executing th[e] directive would not implicate any testimonial communication," and thus would not impair the appellant's fifth amendment rights. 811 F.2d at 117.

In both *Davis* and *In Re N.D.N.Y. Grand Jury Subpoena*, we adopted the Eleventh Circuit's approach toward resolving these questions as set forth in *United States v. Ghidoni, supra.* In *Ghidoni*, the Eleventh Circuit was confronted with the same question presented in the instant appeal. The directive at issue there differed from the ones here in only minor respects. For example, it was entitled "consent directive," rather than "directive," and, in addition to using language indicating that it was directed to any bank where appellant had an account, it also named a specific bank, whereas the directives at issue here do not name any specific bank or financial institution.

After first setting out general fifth amendment principles, the *Ghidoni* court then reviewed the directive in light

of those Supreme Court decisions addressing the testimonial and incriminating aspects of the compelled production of documents, i.e., *United States v. Doe,* 465 U.S. 605 (1984), and *Fisher v. United States,* 425 U.S. 391 (1976). Thus, the *Ghidoni* court likened the situation before it—where an individual was being compelled to authorize and direct a third party, i.e., the banks, to produce documents—to the situations presented in *Doe* and *Fisher,* where an individual was compelled to produce the documents himself.

The *Ghidoni* court, accordingly, examined the directive to determine whether it contained any testimonial assertions regarding the documents sought from the banks. The court concluded that the directive was "devoid of any testimonial aspects," 732 F.2d at 818, after it found that "nothing in the directive implie[d] that [bank] accounts exist," that it contained no statements regarding possession or control over such accounts, and that it could not be used to authenticate any records obtained. *Id.* at 818-819. The court thus concluded that compelled execution of the directive would not violate the privilege against self-incrimination because the directive itself was not testimonial in nature. *Id.* at 819. In upholding the compelled execution of the directive, the court further observed that the defendant was only being compelled to "waive a barrier [i.e., foreign states' confidentiality laws] to permit the bank to produce documents"—an *act* which it concluded provided no testimonial assertions. *Id.* at 819 n.12.

The *Ghidoni* decision is not without criticism. Its approach to these questions was recently rejected by the First Circuit in *In Re Grand Jury Proceedings (Ranauro),*

814 F.2d 791 (1st Cir. 1987). In *Ranauro*, the First Circuit agreed with the *Ghidoni* court's conclusion that the directive itself does not assert that any records exist, that the appellant has control over such accounts, or that any records obtained would be authentic. *Id.* at 793. The court observed, however, that the directive did "admit and assert [the appellant's] consent," *id.*, and thus it concluded that his assertion of consent could be potentially incriminating, because it might later be used "to prove the ultimate facts that accounts in [appellant's] name existed or that [appellant] controlled those accounts." *Id.* To illustrate how the directive may later be used at trial as self-incriminating testimony, the court posited the following hypothetical:

> Suppose that at trial the government were to introduce bank records produced in response to a subpoena that had been accompanied by the consent form and that it was not apparent from the face of the records or otherwise how [appellant] was linked to them. Suppose also that the government then introduced the subpoena and consent form, and a government witness testified that the bank records were received in response to the subpoena and consent form. Would not the evidence linking [appellant] to the records be his own testimonial admission of consent? We believe it would.

Id. Thus, the court found that since the directive contained a statement admitting his consent, that statement, standing alone, constituted a self-incriminating testimonial communication. *Id.* The court, accordingly, concluded that compelled execution of the directive would violate the fifth amendment. *Id.*

While we see some merit in the First Circuit's approach, we are constrained here to apply our precedent in

N.D.N.Y. Grand Jury Subpoena, and follow the analysis set forth in *Ghidoni.* We therefore hold that because the directives here contain no testimonial assertions, the district court orders compelling appellants to sign the directives provide no basis for a fifth amendment violation. The directives here, as in *Ghidoni,* do not contain any assertions by appellants regarding the existence of, or control over, foreign bank accounts. They authorize disclosure of records and information only if such accounts exist. We also agree with the *Ghidoni* court's conclusion that the directives could not be used to authenticate any bank records obtained.

In affirming the district court here, however, we necessarily must clarify certain aspects of our holdings in *Davis* and *In Re N.D.N.Y. Grand Jury Subpoena.* Appellants suggest that the determination of the fifth amendment question in those decisions rested on the fact that the government was precluded from using the directive at trial as an admission against the signator of the directive. Appellants contend that we recognized in those cases that the directives were both testimonial and incriminating, and that by sanctioning a district court order precluding admission of the directives into evidence, we were approving of a de facto use immunity—a practice forbidden by *United States v. Doe,* 465 U.S. 605, 614-617 (1984).

In light of our holding today, it is clear that the fifth amendment would not stand as a bar to admission of the directives into evidence at trial because the directives contain no testimonial assertions that are incriminating, and thus do not implicate fifth amendment questions. *But cf. In Re N.D.N.Y. Grand Jury Subpoena,* 811 F.2d at 117.

We also note, however, that since the directives contain no statements regarding existence of, or control over, any accounts, they should be excluded from evidence because they lack any probative value. *Ghidoni,* 732 F.2d at 818 & n.9.

Appellants argue that when the district court entered its order excluding the directives from evidence, it accordingly created a de facto use immunity for statements made in the directives. We disagree. When the district court entered its orders precluding admission of the directives into evidence, it was merely ruling on evidentiary questions relating to materiality, relevance, prejudice, etc., all of which could be and were resolved in the sound discretion of the district court. We conclude here that, because the directives lack any probative testimonial value on the issue of existence or control, *Ghidoni,* 732 F.2d at 818 & n.9, the district court properly excluded them from evidence.

II. *Due process claim.*

Appellants also claim that by signing the directives at issue they were being forced to sign a document containing false or misleading statements in violation of their right to due process of law. Appellants contend that since they were not "authorizing" or "directing" the foreign financial institutions to do anything, except in compliance with a court order, the directives, as written, do not adequately indicate their coerced nature. Accordingly, they request that we reverse the contempt orders, because the directives do not state that appellants were compelled to sign them "under protest" or "under the threat of incarceration."

We reject appellants' arguments. The directives, as written, satisfied the requirements set out in *In Re N.D. N.Y. Grand Jury Subpoena,* 811 F.2d at 117-118. There, we held that so long as a directive indicated that it was signed under protest *or* pursuant to a district court order, it would not be considered misleading. *Id.* at 118. Here, the directives included language indicating that they were signed pursuant to a district court order, and thus they adequately reflected their coerced nature.

Affirmed.

In re Grand Jury Subpoena v. U.S.A.
#87-6165

(Filed August 14, 1987)

JON O. NEWMAN, *Circuit Judge,* concurring:

I concur in Judge Altimari's opinion but write separately because I do not believe the path of our prior decisions nor the outcome to which they lead us in this case is quite so clear as my colleagues suggest.

The use of a grand jury subpoena to compel a person to "consent"[1] to disclosure and production of bank records concerning his account is a device of very recent origin. The first appellate decision to consider whether this device violates the privilege against self-incrimination appears to be *United States v. Ghidoni,* 732 F.2d 814 (11th Cir. 1984), an appeal from a contempt adjudication for refusal to sign the "consent." A divided panel approved the device, concluding that signing the "consent" form was not a " 'testimonial communication,' " *id.* at 816 (quoting *Fisher v. United States,* 425 U.S. 391, 408 (1976)), and for that reason was not protected by the privilege. The ma-

jority believed that a communication is testimonial when it asserts a fact (involves " 'truthtelling,' " *id.* at 818), and that the "consent" form contained no assertion of fact.[2]

This Circuit first encountered the problem the following year in *United States v. Davis,* 767 F.2d 1025 (2d Cir. 1985). *Davis* was an appeal from a conviction. One ground of the appeal was the use in evidence of bank records obtained as a result of a "consent" signed by the defendant under the compulsion of a court order. The Court apparently accepted the defendant's premise that, if the "consent" had been compelled in violation of the self-incrimination privilege, the bank records should not have been admitted into evidence. The defendant had not tested the compulsion order by resisting the order and appealing a contempt adjudication. Facing the issue of whether the "consent" order violated the privilege, the Court conceded that the "consent" form "might have had communicative aspects of its own," *id.* at 1040. The Court rejected this possibility in the following passage:

> However, [the District Judge's] carefully crafted order specifically provided that the Government could not use the directive as an admission that the bank accounts existed, that Davis had control over them, or for any other purpose. These limitations on the use of the directi[ve] obviate any claim of testimonial compulsion. *See Ghidoni, supra.*

Id.

This passage is subject to two interpretations. One, urged by the appellants in the pending appeal, is that the District Judge in *Davis* had precluded use of the "consent" directive at trial by, in effect, conferring "use" immunity. Had this occurred, appellants point out, the

District Judge would have been exceeding his authority, since the Supreme Court has made it clear that "use" immunity may not be informally conferred but requires a formal request by the Department of Justice pursuant to 18 U.S.C. §§ 6002, 6003 (1982). *United States v. Doe,* 465 U.S. 605, 616 & n.16 (1984). From this interpretation of the *Davis* passage appellants contend that *Davis* rejected the self-incrimination objection on an impermissible basis and that we must now consider anew the issue of whether the "consent" directive is protected by the privilege.[3]

The second interpretation of the *Davis* passage, adopted by Judge Altimari's opinion, is that the *Davis* panel did not think that the District Judge had endeavored to confer "use" immunity, but had considered him merely to have made an evidentiary ruling. Under this interpretation, the "consent" directive did not violate the self-incrimination privilege because it contained nothing of evidentiary significance. If I were focusing solely on the two sentences quoted above, I would have some doubt about that interpretation of *Davis.* However, my doubts are allayed by the citation to *Ghidoni* that immediately follows these sentences. *Ghidoni* explicitly pointed out, albeit in a footnote, that "use" immunity was not being conferred, that informal judicial "use" immunity was prohibited by *United States v. Doe, supra,* and the [*sic*] the "consent" directive was deemed not to be testimonial because it "lack[ed] any *probative* testimonial value on the issue of control or existence [of the bank records]." 732 F.2d at 818 n.9 (emphasis added). By citing *Ghidoni,* the *Davis* panel must have been adopting this aspect of *Ghidoni's* reasoning.

Our Court again encountered a "consent" directive earlier this year in *In re N.D.N.Y. Grand Jury Subpoena # 86-0351-S (Alexander)*, 811 F.2d 114 (2d Cir. 1987), an appeal from a contempt adjudication. The rejection of the self-incrimination objection in *Alexander* perpetuated the uncertainty, created by *Davis*, as to whether this Circuit was relying on some form of unauthorized judicial "use" immunity or on evidentiary considerations. The *Alexander* panel noted that the "consent" directive, unlike the one used in *Davis*, "does not expressly provide that it may not be used as an admission by Alexander for any purpose." *Id.* at 117. Nevertheless, the panel concluded, "it seems clear that the government could not so use it consistently with Alexander's fifth amendment rights. *See Davis*, 767 F.2d at 1040." *Id.* A permissible reading of this sentence, urged by the appellants in the pending case, is that the panel was conferring judicial "use" immunity at the appellate level, something at least as unauthorized as the informal district court "use" immunity proscribed by the Supreme Court in *Doe*. If the panel believed that use of the "consent" directive would have been inconsistent with the witness's self-incrimination privilege and *for that reason* could not be used against the witness, there is some basis for believing that only the appellate preclusion ruling, rather than evidentiary considerations, led to rejection of the self-incrimination objection. However, there are countervailing considerations. First, the panel explicitly relied upon *Ghidoni*, and, like the *Davis* panel, must have understood, as the *Ghidoni* footnote made clear, that informal judicial "use" immunity was not an adequate answer to the self-incrimination objection. Second, the *Alexander* panel, noting that the "consent" directive "requires disclosure only *if* the bank has such accounts," con-

cluded that signing the direction "would not implicate any testimonial communication" and for that reason "does not impair Alexander's rights under the fifth amendment." *Id.* at 117 (emphasis in original).

Though the matter is not free from doubt, it appears that *Davis* and *Alexander* establish, as the law of this Circuit, that a "consent" for disclosure of records of any bank accounts a witness might have is not a testimonial communication, that it is consequently not protected by the self-incrimination privilege, and that a court order compelling the signing of such a "consent" does not violate the Fifth Amendment. These conclusions are in accord with those of the Eleventh Circuit, *United States v. Ghidoni, supra,* and the Fifth Circuit, *In re United States Grand Jury Proceedings (Cid),* 767 F.2d 1131 (5th Cir. 1985), but are not shared by the First Circuit, *In re Grand Jury Proceedings (Ranauro),* 814 F.2d 791 (1st Cir. 1987).

Were the matter open in this Circuit, I would deem the issue to be extremely close. The premise of the conclusion rejecting a self-incrimination objection seems to be that a statement is within the scope of the privilege only if it asserts a fact. As *Ghidoni* puts it, the statement must serve a "truth-telling" function, 732 F.2d at 818. Judge Breyer, dissenting in *Ranauro,* similarly contends that a statement is within the scope of the privilege only when it is "the kind of communication that could, in principle, be false." 814 F.2d at 798. These views of the privilege are derived largely from the Supreme Court's decisions in *Fisher* and *Doe.* The issue in those cases was whether the act of producing documents, not itself the making of a statement, might nonetheless be within the privilege as an implied statement of some fact, for example, the fact that

the witness has possession or control of the documents. Because the Supreme Court examined the act of production to see if it implied an assertion of fact, some have drawn the inference that a statement that does not assert a fact is not a testimonial communication. This inference is the inverse of the proposition that all assertions of fact are testimonial communications, and, as logicians inform us, an inverse of a proposition is possibly but not necessarily so. *See* McCall, *Basic Logic* (2d ed. 1952).[4]

In *Fisher* and *Doe* the Supreme Court did not purport to announce a universal test for determining the scope of the privilege. It simply acknowledged that the privilege applies to *acts* that imply assertions of fact. It did not have occasion to consider the test for determining when the pirvilege applies to oral or written *communications*. What the Court has clearly decided in earlier cases is that certain acts, though incriminating, are not within the privilege. The privilege is not violated by compelling a person to furnish a handwriting exemplar, *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); to stand in a lineup or furnish a voice exemplar; *United States v. Wade*, 388 U.S. 218, 222-23 (1967); to provide a blood sample, *Schmerber v. California*, 384 U.S. 757, 763-65 (1966); or to don clothing, *Holt v. United States*, 218 U.S. 245, 252-53 (1910). What the Court has not yet decided is the issue posed by a "consent" directive: Does the privilege apply to every written or oral statement, the content of which might tend to incriminate? *Gilbert* and *Wade* do not answer that question. Even when a person is compelled to utter or write particular words for use as a voice or handwriting exemplar, the resulting oral or written statement is incriminating only because of the physical characteristics of the

sounds or the lettering. It is not the content of the statement that creates the risk of incrimination.

To decide whether the privilege applies to every oral or written statement significant because of its content, including those that contain no assertion of fact, would require some consideration of the policies the privilege is designed to protect. As Dean Wigmore has pointed out, there are numerous policies implicated by the privilege, and no agreement on which policies are sufficiently central to warrant constitutional vindication. *See* 8 J. Wigmore, *Evidence* § 2251 (McNaughton rev. 1961). Some emphasize the policy of preventing the unfairness that results when a person must face "the cruel trilemma of self-accusation, perjury or contempt," *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964). Vindicating that policy would lead to a requirement that a statement must assert the truth of something in order to be within the privilege. *See Ranauro, supra,* 814 F.2d at 797 (Breyer, J., dissenting). On the other hand, many emphasize the policy of striking the appropriate balance between the power of the state and the sovereignty of the individual. *See* Griswold, *The Right To Be Let Alone,* 55 Nw. U.L. Rev. 216 (1960). That policy would be vindicated by prohibiting the state from compelling a person to furnish any oral or written statement incriminating because of its content, whether or not the statement makes a factual assertion. That policy would appear to be seriously undermined by the use of state power to compel a person to utter or write words, the content of which signifies "consent" to anything.

I regret that in developing the law of this Circuit we have not confronted directly the issue whether a com-

munication with incriminating content but without an assertion of fact is protected by the privilege.[5] I would find that issue troubling. Nevertheless, I am satisfied that our Circuit has reached the conclusion that a written communication expressing consent to disclosure of any bank records of the witness that might exist is not within the scope of the privilege. Obliged to accept that conclusion as the law of this Circuit, I concur in the opinion affirming the adjudication of contempt.[6]

FOOTNOTES

[1]I put the word in quotation marks to acknowledge the oxymoronic nature of a compelled "consent."

[2]The dissent in *Ghidoni* rests on the view that the "consent" was protected by the privilege because "it furnishes a link in the chain leading to procurement of the documents that the government intends to use to secure Ghidoni's conviction." 732 F.2d at 821 (Clark, J., dissenting). That argument is not entirely satisfactory. The "link in the chain" basis for invoking the privilege normally applies when the compelled answer itself is plainly testimonial and the facts disclosed by the testimonial answer lead to discovery of incriminating testimony or real evidence. *See Hoffman v. United States,* 341 U.S. 479, 486 (1951); *Blau v. United States,* 340 U.S. 159, 161 (1950); *United States v. Burr,* 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e). If the majority in *Ghidoni* is correct that the "consent" is not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence. Much compelled evidence, such as handwriting exemplars, fingerprints, and blood samples, leads to the development of highly incriminating testimony, but compulsion of such evidence does not violate the privilege. *See Schmerber v. California,* 384 U.S. 757, 764 (1966).

[3]Though a subsequent panel is obliged to follow the precedents established by prior panels of this Circuit, including decisions that authoritatively construe and apply Supreme Court decisions, it is by no means clear that a subsequent panel must follow a Circuit precedent that has not reckoned with a prior Supreme Court decision with which the Circuit precedent is in irreconcilable conflict.

[4]In *Fisher,* Justice White's opinion for the Court notes that in that case the Government was "in no way relying on the 'truthtelling' of the taxpayer to prove the existence of or his access to the documents." 425 U.S. at 411. This may imply that "truthtelling" is a prerequisite for the privilege, but that again would be reasoning on the unsure ground of an inverse proposition. Concurring in the judgment in *Fisher,* Justice Brennan asserted, "[I]t does not follow that papers are not 'testimonial' and thus producible because they contain no declarations." *Id.* at 422-23.

[5]Whether the content of the "consent" directive might be incriminating, even if an assertion of fact is not required to invoke the privilege, is a matter of fair dispute. In *Ranauro,* the First Circuit outlined a chain of incrimination in which the furnishing of consent, followed by a bank's production of records, would provide evidence that the records were those of the consenting witness. It seems clear that if the connection of the records to the witness were disputed, the "consent" document would have some materiality to the issue, that is, it would make the fact to be proved, control of the account, more likely to be true than would be the case without the evidence. *See* Fed. R. Evid. 401 (using this test to define "relevant evidence"). On the other hand, evidence from the bank, which would be necessary to authenticate the records, would likely furnish such clear proof that the account is that of the witness, that evidence of his consent to disclosure arguably does not expose him to any "realistic threat of incrimination," *Fisher v. United States, supra,* 425 U.S. at 412.

[6]Were the issue open, I would have acceded to appellants' request that the "consent" form be revised to state expressly that it is being signed "under protest." I would have thought that our supervisory power should be exercised to make clear that the "consent" is being signed, not merely pursuant to court order but also under protest. There are some documents a person would cheerfully sign pursuant to a court order. These witnesses ought to be able to make clear that a court has ordered them to sign a document they would otherwise have refused to sign. However, I agree that the "pursuant to court order" language is sufficient under the controlling authority of *Alexander.*